

No. 77067

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

JOSEPH WHITFIELD,

Appellant.

**RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT
IN OPPOSITION TO MOTION TO
RECALL THE MANDATE**

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT.....	5
STATEMENT OF FACTS	6
ARGUMENT	
Point I - The court should decline to recall its mandate.....	8
CONCLUSION.....	19
CERTIFICATE OF COMPLIANCE AND SERVICE	20
APPENDIX.....	A-1

TABLE OF AUTHORITIES

Cases

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Other Authorities

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JURISDICTIONAL STATEMENT

This brief concerns appellant's motion to recall the mandate in State of Missouri v. Joseph Whitfield, No. SC77067. The appeal involved a defendant under capital sentence where this court affirmed the conviction and sentence and affirmed the denial of post-conviction relief. State v. Whitfield, 939 S.W.2d 361 (Mo. banc), cert. denied, 522 U.S. 831 (1997). This court had jurisdiction over the original appeal pursuant to Article V, §3 of the Missouri Constitution.

STATEMENT OF FACTS

On January 20, 1988, appellant murdered Ronald Chester. The circumstances surrounding the murder can be found in this court's opinion at State v. Whitfield, 939 S.W.2d 361, 364 (Mo. banc 1997). At appellant's first trial, the jury found him guilty of first degree murder and recommended a sentence of death. This court reversed that verdict and sentence on direct appeal. State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992). Upon remand, a jury reconvicted appellant of first degree murder and armed criminal action. The jury deadlocked on punishment, and the trial court resentenced appellant to death on the murder charge and life in prison on an armed criminal action charge. Appellant pursued post-conviction relief under Missouri Supreme Court Rule 29.15. This court affirmed the conviction, sentence and judgment as well as the order denying post-conviction relief. State v. Whitfield, 939 S.W.2d 361 (Mo. banc 1997). The United States Supreme Court denied discretionary review.¹

¹ After the direct appeal, appellant filed a petition for writ of habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Eastern District of Missouri. Whitfield v. Bowersox, No. 4:97-CV-1412 CAS (E.D. Mo.). The federal district court concluded that this court acted unreasonably in resolving the post-conviction issue of whether appellant received ineffective assistance of trial counsel. Whitfield v. Bowersox, No. 4:97-CV-1412 CAS, slip op. at 5-25 (E.D. Mo. Jan. 24, 2001). Accordingly, the federal district court issued a writ of habeas corpus that set aside appellant's capital sentence and allowed the State of Missouri ninety days in which to seek a new penalty phase. Id. slip op.

Whitfield v. Missouri, 522 U.S. 831 (1997).

Appellant filed a motion to recall the mandate in this cause on July 29, 2002. Respondent filed suggestions in opposition to the motion. The court ordered further briefing. The motion to recall the mandate is pending before this court.

at 64-65. The State of Missouri appealed, and appellant cross-appealed. Joseph Whitfield v. Michael Bowersox, Nos. 01-1537, 01-1538 (8th Cir.). The appeal is pending before the United States Court of Appeals for the Eighth Circuit.

ARGUMENT

APPELLANT IS NOT ENTITLED TO AN ORDER RECALLING THE MANDATE BECAUSE THE MOTION TO RECALL THE MANDATE IS NOT AN AVAILABLE REMEDY BY WHICH TO LITIGATE A CLAIM UNDER RING V. ARIZONA IN THAT (1) APPELLANT DID NOT BRIEF AND THIS COURT DID NOT DECIDE A SIXTH AMENDMENT/RING CLAIM IN THE 1997 OPINION AND (2) THE RULE IN RING DOES NOT APPLY RETROACTIVELY TO CASES WHERE THE DIRECT APPEAL IS FINAL WHEN RING WAS DECIDED.

EVEN IF THE MOTION TO RECALL THE MANDATE WERE AN AVAILABLE REMEDY, APPELLANT'S RING CLAIM IS MERITLESS BECAUSE (1) THE RULE IN RING DOES NOT APPLY RETROACTIVELY AND (2) THE UNDERLYING RING CLAIM IS MERITLESS IN THAT THE JURY FOUND THE EXISTENCE OF A CIRCUMSTANCE THAT RENDERED APPELLANT ELIGIBLE FOR CAPITAL PUNISHMENT.

Appellant complains that a Sixth Amendment right to jury sentencing was violated when the trial judge imposed capital punishment after the jury was unable to decide the appropriate punishment (App. Brf., pages 9-17). Relief should be denied for a variety of reasons.

Standard of Review

The standard of review for a motion to recall the mandate is discussed by this court

in State v. Thompson, 659 S.W.2d 766 (Mo. banc 1983).

[O]ur courts have properly recognized that a mandate may be recalled in order to remedy a deprivation of the federal constitutional rights of a criminal defendant. For example, a motion to recall the mandate may be employed to seek reconsideration of an appellate court's affirmance of a conviction when a criminal defendant alleges ineffective assistance of counsel on appeal or when a defendant has been deprived of appellate counsel altogether. . . .

Such a motion may be employed when the decision of a lower appellate court directly conflicts with a decision of the United States Supreme Court upholding the rights of the accused. See State v. McReynolds, 581 S.W.2d 465 (Mo. App. 1979); State v. Nevels, 581 S.W.2d 138 (Mo. App. 1979).

State v. Thompson, 659 S.W.2d at 769 (some citations omitted). The legal issue thus becomes whether this court's decision in State v. Whitfield, 939 S.W.2d at 361, directly conflicts with a subsequent Supreme Court decision upholding the rights of the accused, State v. Thompson, 659 S.W.2d at 769. Appellant does not fulfill his burden under this standard.

Motion to Recall the Mandate
is not a Remedy for Appellant's Claim

Under the standard set forth by this court in Thompson, the motion to recall the mandate should be denied. Appellant seems to contend that the mandate should be recalled because this court's decision conflicts with the Supreme Court's decision in Ring v. Arizona

(App. Brf., pages 9-11 citing Ring v. Arizona, 122 S.Ct. 2428 (2002)). There is no conflict between this court's 1997 decision and Ring. In appellant's direct appeal before this court, appellant did not contend that his Sixth Amendment right to a jury trial was violated at the penalty phase of his trial. Appellant does not quote any language from this court's January 21, 1997 decision that directly conflicts with Ring (App. Brf., pages 9-15).

Instead of discussing the standard set forth in Thompson, appellant suggests that a motion to recall the mandate is proper where the movant seeks relief from defects in appellate court proceeding (App. Brf., pages 15-16). After stating this basic legal proposition, however, appellant does not show a defect in appellate court proceedings in his direct appeal. Appellant is not entitled to a recall of the mandate.

Appellant also hints that a recall of the mandate is proper where a recall of the mandate can remedy a deprivation of federal constitutional rights² (App. Brf., page 16 quoting State v. Thompson, 659 S.W.2d at 769). After quoting that language from Thompson, however, appellant agrees that the language applies to situations where the decision of the appellate court directly conflicts with a decision of the United States Supreme Court upholding the rights of the accused (App. Brf., page 16 quoting State v. Thompson, 659 S.W.2D at 769). See also Nave v. Delo, 62 F.3d 1024, 1032 (8th Cir. 1995), cert.

²Respondent notes that appellant failed to object at trial on a Ring/Sixth Amendment theory (Tr. 2226-30), failed to include the claim in the motion for new trial (Direct Appeal Legal File -- hereinafter DALF -- page 151) and failed to brief the claim on direct appeal.

denied, 517 U.S. 1214 (1996). When applying this standard, however, appellant does not show that the January 21, 1997 decision by this court directly conflicts with Ring.

Not only is appellant unable to refer the court to language in the 1997 opinion that directly conflicts with Ring, he does not show that Ring applies retroactively to situations where the direct appeal is final. In State v. Thompson, this court made clear that the Supreme Court decision upholding the rights of the accused must be one that applies retroactively. See State v. Thompson, 659 S.W.2d at 769 citing State v. McReynolds, 581 S.W.2d 465 (Mo. App. 1979) and State v. Nevels, 581 S.W.2d 138 (Mo. App. 1979). In discussing McReynolds and Nevels, the Thompson court focused on whether Duren v. Missouri, 439 U.S. 357 (1979) would apply retroactively. Since Lee v. Missouri, 439 U.S. 461 (1979) expressly made the holding in Duren retroactive to the date of the decision in Taylor v. Louisiana, 419 U.S. 522 (1975), it was appropriate for the Missouri Court of Appeals to recall its mandate. See State v. Thompson, 659 S.W.2d at 769.

Since the Supreme Court decision in Thompson, the Supreme Court's jurisprudence on retroactivity has been greatly simplified by its decision in Griffith v. Kentucky, 479 U.S. 413 (1987). In Griffith, the Supreme Court held that a new rule for the conduct for criminal prosecutions is to be applied retroactively only to cases, state or federal, pending on direct review or not yet final. Id. at 328. Since appellant's appeal was not pending on direct review and it was final in June, 2002, Ring does not apply retroactively to appellant's case. Accordingly, under Thompson, a motion to recall the mandate is not an available remedy by which to litigate a Ring claim.

Appellant provides no discussion of the non-retroactivity of Ring in his brief. In his motion to recall the mandate appellant contended that Ring applied retroactively because it was "a substantive rule of law" (Motion, page 4, paragraph 5 citing Bousley v. United States, 523 U.S. 614 (1998)). Bousley involved the United States Supreme Court's construction of "using" a firearm in violation of 18 U.S.C. §924(c)(1) as requiring active employment of the firearm. Id. at 616 citing Bailey v. United States, 516 U.S. 137, 144 (1995). In Bousley, the Supreme Court held that the Supreme Court's construction of the federal statute applies retroactively. Bousley v. United States, 523 U.S. at 620. In contrast, Ring does not involve the Supreme Court's construction of §565.020, RSMo. 1984 et seq., nor for that matter, does Ring involve the Supreme Court's construction of Arizona statutes. Instead, Ring involves the scope of the Sixth Amendment right to jury trial. Ring does not apply retroactively. Trueblood v. Davis, 301 F.3d 784, 2002 U.S. App. LEXIS 16682 *11 (7th Cir. 2002); Cannon v. Mullin, 297 F.3d 989, 992-4 (10th Cir. 2002); Morrow v. Luebbers, No. 4:00-CV-1143-ERW, slip op. at 91-92 n.13 (E.D. Mo. Sept. 30, 2002). Apprendi also does not apply retroactively. State ex rel. Nixon v. Sprick, 59 S.W.3d 515, 520 (Mo. banc 2001) citing Dukes v. United States, 255 F.3d 912, 913 (8th Cir. 2001). Since neither Apprendi nor Ring apply retroactively, appellant is unable to show that the January 21, 1997 decision of this court directly conflicts with the decision from the United States Supreme Court.

Finally, appellant contends in the alternative that he received ineffective assistance of direct appeal counsel because counsel did not brief the Ring issue (App. Brf., pages 16-17). Appellant fails to plead facts that if true, that would

entitle him to relief. Appellant did not contend in his motion to recall the mandate that he received ineffective assistance of direct appeal counsel (Motion, pages 2-5). In his brief to this court, the claim of ineffective assistance of direct appeal counsel appears at most to be an afterthought (App. Brf., page 17). Appellant does not plead facts that if true, that would entitle him to relief (App. Brf., pages 16-17). Appellant fails to plead facts that would instill a duty in appellate counsel to brief the issue under Strickland v. Washington, 466 U.S. 668 (1984). To support [a motion to recall the mandate], strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that was so obvious from the record that a competent and effective appellate lawyer would have recognized it and asserted it.

State v. Edwards, 983 S.W.2d 520, 522 (Mo. banc 1999). Given the status of the law in 1997, appellant fails to show a breach of duty by appellate counsel. See State v. Smith, 944 S.W.2d 901, 919 (Mo. banc), cert. denied, 522 U.S. 954 (1997). Appellate counsel has no duty to anticipate and brief future changes in the law. Horne v. Trickey, 895 F.2d 497, 500 (8th Cir. 1990); Parker v. Bowersox, 188 F.3d 923, 929 (8th Cir. 1999).

The Ring Claim Is Meritless

Appellant's Ring claim is meritless. As noted, the rule in Ring does not apply retroactively; thus, it cannot be a foundation for relief for appellant. Additionally, appellant's claim is meritless. The Supreme Court held in Ring that a jury must find the existence of the fact that a statutory aggravating circumstance exists. In the case at bar, the jury implicitly found a statutory aggravating circumstance existed by considering the death penalty before it returned an unable-to-decide verdict. Jury Instruction No. 19 informed the jury that "in order to consider the death penalty, you must find beyond a reasonable doubt certain propositions relating to aggravating circumstances" (Direct Appeal Legal File -- hereinafter DALF -- page 211). Jury Instruction No. 22 began by instructing the jury that "[i]n determining the punishment to be assessed under Count I against the defendant for the murder of Ronald Chester, you must first unanimously determine whether one or more of the following aggravating circumstances exists" and concluded by instructing the jury that "if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life" (DALF, page 214). Instructions No. 23 and 24 also emphasize that the jury had to find one or more statutory aggravating circumstances before the further consideration of capital punishment could occur (DALF, pages 215-16).

The jury deadlocked (DALF, page 207).³

The jury's consideration of the death penalty in the light of the above jury instructions showed that the jury found at least one statutory aggravating circumstance. This conclusion is mandated by this court's decision in State v. Smith, 944 S.W.2d 901, 919 (Mo. banc), cert. denied, 522 U.S. 954 (1997).

The jurors cannot return a verdict announcing that they cannot agree on a sentence if they have not agreed on at least one statutory aggravating factor The jurors were instructed that if they could not unanimously find at least one statutory aggravating fact beyond a reasonable doubt, they must return a verdict of a life sentence. We presume that the jury acted in accordance with the court's instruction.

Id. at 919-20 citing State v. Griffin, 756 S.W.2d 475, 488 (Mo. banc 1988), cert. denied, 490 U.S. 1113 (1989).

Additionally, in its post-trial memorandum and order, the trial court stated:

By its verdict, the jury implicitly found that statutory aggravating circumstances existed and that the aggravating circumstances outweighed the

³The penalty phase jury instructions, Instructions No. 19 through 28 are attached to this brief as an appendix.

mitigating circumstances.

(DALF, page 123). Since the jury found the existence of a statutory aggravating circumstance, the rule of Ring is satisfied.

The United States District Court engaged in similar analysis in resolving Morrow v. Luebbbers, No. 4:00-CV-1143 ERW (E.D. Mo. Sept. 30, 2002). After reviewing the Missouri statutes and the instruction, the district court found Mr. Morrow's Ring claim was meritless.

Ring v. Arizona only held that it was unconstitutional for a judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Ring, 122 S.Ct. at 2443. The Missouri statute does not allow the trial judge to get involved in this sentence without the jury's permission and until the jury has found the existence of a statutory aggravating factor. Thus, Missouri statute required then and requires now what Ring and Apprendi dictate -- that the existence of any fact which could increase the punishment that a defendant could receive based on a bare jury verdict be found by the jury. Ring is thus not applicable to Morrow's petition in any manner whatsoever. Ring neither impacts Missouri's death penalty statute on its face, nor makes it unconstitutional as applied to Morrow. Thus, the circumstances surrounding Morrow's sentencing did not violate rights under the Sixth and Fourteenth Amendments to the federal constitution.

Id., slip op. at 91.

Appellant contends that cases like State v. Smith are wrongly decided (App. Brf.,

page 11). Appellant gives no reason for such an anti-intuitive assertion (App. Brf., page 11).

Appellant also criticizes the legal presumption that jury's follow the law by citing cases criticizing evidentiary presumptions that are used as evidence of the existence of an element of the offense. The presumption that the jury follows the instructions given to it is a reasonable presumption that is applied by the state and federal judiciary. See California and Hawaiian Sugar Company v. Kansas City Terminal Warehouse Company, 788 F.2d 1331 citing State v. Preston, 673 S.W.2d 1, 7 (Mo. banc), cert. denied, 469 U.S. 893 (1984).

The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and defendant in the criminal justice process. Richardson v. Marsh, 481 U.S. 200, 211 (1987); Zafiro v. United States, 506 U.S. 534, 540-41 (1993); Grubbs v. State, 760 S.W.2d 115, 119 (Mo. banc 1988), cert. denied, 490 U.S. 1085 (1990).

Finally, appellant contends that there are additional steps in determining whether an individual should receive capital punishment that require a jury determination, and there is no jury verdict on those steps (App. Brf., pages 14-15). Appellant's argument does not accurately perceive the Missouri capital punishment process. Once a statutory aggravating circumstance is found, then the defendant is eligible for further consideration of capital punishment. The finding of the existence of a statutory aggravating circumstance is the threshold that must be met before the sentencer can, after considering all the evidence,

impose capital punishment. See State v. Shaw, 636 S.W.2d 667, 675 (Mo. banc), cert. denied, 459 U.S. 928 (1982) quoting State v. Bolder, 635 S.W.2d 673, 675 (Mo. banc 1982), cert. denied, 459 U.S. 1137 (1983). The existence of statutory aggravating circumstance is what renders a defendant eligible for capital punishment. Appellant's contention is meritless.

CONCLUSION

For the foregoing reasons, respondent prays the court deny appellant's motion to recall the mandate.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of October, 2002.

Charles M. Rogers
Cheryl A. Pilate
1101 Walnut Street, Suite 1300
Kansas City, MO 64106

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Respondent

No. 77067

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RESPONDENT'S APPENDIX
